Supreme Court, U.S.
FILED
MAR 18 1994
CLERK

(3)

No. 93-1318

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

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Amicus Curiae, the International Brotherhood of Teamsters ("IBT"), hereby requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit sought by Petitioner, Interstate Commerce Commission ("ICC" or "Commission"), be denied.

STATEMENT AND INTEREST OF AMICUS CURIAE

This case involves misguided efforts by the ICC to prevent Transcon Lines' ("Transcon") trustee in bankruptcy from recovering freight charges owed by shippers

who failed to pay filed tariff rates as required by the Interstate Commerce Act.[1] Transcon's duly published tariff provided shippers a discounted rate if they paid freight charges within 90 days of shipment. Failure to pay within the 90 days resulted in the application of otherwise published non-discount rates. There is no dispute regarding the clarity of this "loss of discount" provision, nor is there any question as to it being properly filed with the ICC.

After Transcon went into bankruptcy, an audit of its records showed that, notwithstanding the tariff's unambiguous terms, many shippers had paid (or were seeking to pay) discount rates long after the 90-day period had elapsed.[2] On behalf of creditors of the estate, the trustee has attempted to recover the applicable undercharges from the shippers, *i.e.*, the difference between the discount and non-discount rates. The ICC has sought to enjoin the trustee from collecting these undercharges on the basis that Transcon failed to comply with the Commission's credit regulations.[3]

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[1] The duty of a carrier to collect and a shipper to pay filed tariff rates, sometimes referred to as the "filed rate doctrine", is a clear requirement of the Interstate Commerce Act. 49 U.S.C. §§ 10761(a) and 10762(a)(1).

[2] It is our understanding that some shippers have not paid any freight charges for services they received years ago and on the basis of the ICC's position contend to this very day that they are entitled to discounted rates.

[3] The ICC has alleged that Transcon's original bills did not advise shippers of the consequences of late payment, in violation of 49 C.F.R. 1320.3(c); revised bills were not issued until after the 90-day period provided for in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii).

This case has been before this Court once before at which time it granted certiorari and remanded for further consideration in light of its recent decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). See *ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993). On remand the court of appeals concluded that its earlier decision was in complete accordance with this Court's holding in *Reiter*. Pet. at 4a.[4]

It is time to bring this seemingly endless litigation to a conclusion and allow the trustee to collect monies owed by delinquent shippers so that creditors finally can be paid at least part of the amounts due them. Former and current members of the IBT who had been employed by Transcon are the largest creditors of the Transcon estate. They are owed more than $23 million in back wages, severance pay, etc.[5] In addition, a claim for almost $16 million was filed by the Central States, Southeast and Southwest Areas Pension Fund, which is the pension fund covering IBT members employed by Transcon.[6] The undercharge claims brought by Transcon's trustee are the estate's major, if not only, asset and the collection of these claims represents the only hope which these former employees have of recovering any portion of the monies

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[4] Citations to the ICC's Petition and Appendices are referred to as "Pet. at ___."

[5] A copy of the proof of claim filed on behalf of Transcon's former employees was attached as Appendix A to the IBT's brief in support of the Respondents in this case, 92-1547 Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 1a-6a.

[6] See Appendix B to IBT's brief in support of the Respondents in this case, 92-1547 Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 7a-9a.

they are owed. For that reason and because a reversal of the Ninth Circuit's decision is unwarranted and would significantly erode the filed rate doctrine which is of critical importance to the well being of hundreds of other motor carriers and the thousands of people they employ, many of whom are IBT members, this brief is being filed in support of the Respondents and in opposition to the petition for a writ of certiorari (hereafter "Petition") filed by the ICC.

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED

On remand, the Ninth Circuit correctly held that its earlier decision, in which it found that a failure to comply with certain technical ICC credit regulations did not prevent the trustee from collecting Transcon's filed tariff rate, is consistent with this Court's decision in *Reiter v. Cooper, supra*.

If the ICC's position is upheld and Transcon's loss of discount provisions are voided, all shippers that transported cargo with Transcon would receive the discounted rate regardless of whether they had paid their freight charges within the required 90 days. As a result, those shippers who had paid their freight charges within 90 days would be prejudiced vis a vis those shippers who chose to ignore the 90-day requirement. Adopting the ICC's position would in fact sanction the type of discriminatory conduct that the Commission's credit regulations expressly prohibit.

In addition, prohibiting the trustee from collecting filed tariff rates from late paying shippers will severely

prejudice Transcon's former employees. These shippers helped to force Transcon into bankruptcy by refusing to pay discounted rates within the time prescribed. Now, if they are permitted to avoid paying the higher rates provided for in Transcon's tariff for late payment, i.e., the non-discounted rates, these same shippers will deprive Transcon's former employees of wages, severance pay and pension contributions owed to them. This Court should not sanction such a result; it would not be fair or equitable.

REASONS WHY WRIT SHOULD BE DENIED

1. The Ninth Circuit Decision Dismissing The Injunction Is In Accordance With *Reiter v. Cooper*

The ICC requests in its Petition that " . . . the judgment of the court of appeals [should be] summarily reversed on the authority of *Reiter v. Cooper*. . . . " Pet. at 19. The ICC's contention that the court of appeals' decision is inconsistent with *Reiter* is unfounded. Indeed the Ninth Circuit's decision is mandated by and entirely consistent with *Reiter*.

In *Reiter*, this Court reaffirmed the validity and need for strict enforcement of the filed rate doctrine. *Reiter v. Cooper*, 113 S.Ct. 1213. While the *Reiter* Court went on to hold that *shippers* may avoid the filed rate by asserting claims and defenses accorded by the Act, nowhere in *Reiter* does the Court grant the ICC authority to seek to enjoin collection of the filed tariff rates by a bankruptcy trustee.

The filed rate doctrine embodies the principle that a *shipper* cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. * * * It assuredly does *not* preclude avoidance of the tariff rate, however, through *claims* and *defenses* that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any 'unreasonable-rate defense,' derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be 'reasonable.' * * * But we cannot agree that the filed rate doctrine precludes *shippers* from asserting (by way of *claim* or *counterclaim*) the reparations rights explicitly conferred by § 11705(b)(3).

Reiter v. Cooper, 113 S.Ct. 1213, 1219 (emphasis added; citations omitted). The ICC acknowledges that the Court granted shippers the right to raise defenses and counterclaims but it then contends without any support that: "The ICC's right to bring an injunction action in this case directly follows from the principle established in *Reiter*." Pet. at 11. This illogical leap of faith from the "principle" in *Reiter* is noticeable for its lack of authority. As the court of appeals concluded below:

> The ICC's argument is unwarranted by a plain reading of *Reiter*. By its clear language, *Reiter* did no more than address claims or defenses that the ICA specifically accorded to *shippers*. Unequivocal Supreme Court precedent holds, however, that the ICA does not confer on shippers the right to raise any claims or defense arising from a carrier's violation of ICC credit

> regulations. As such, the holding in *Reiter* does not directly apply to the facts of this case.

Pet. at 4a.

In order to avoid the plain meaning of *Reiter*, the ICC insists that *Reiter* should be read liberally to allow the ICC, in addition to a shipper, to assert claims and defenses accorded by the ICA. Pet. at 10-14. In doing so, however, the ICC would have this Court ignore the fact that the failure to adhere to ICC credit regulations does not give rise to a *claim* or *defense* cognizable under the Interstate Commerce Act to an action for undercharges by a trustee. The filed rate doctrine, *i.e.*, the duty of the carrier to collect and the shipper to pay filed tariff rates (see 49 U.S.C. §§ 10761(a) and 10762(a)(1), and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)) is not modified or excused because of a carrier's failure to comply with credit regulations. This was the holding in *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). In *Commercial Metals*, the Court specifically concluded that,

> . . . the carrier's . . . violation of the credit regulations are insufficient . . . to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) will estop or preclude it [the carrier] from enforcing payment of the full amount by a person liable therefor.

Id. at 352 (citations omitted). Since a shipper cannot avoid the enforcement of the filed rate by asserting violations of the ICC's credit regulations, there is no basis under *Reiter v. Cooper* for finding that the ICC may do so.

Even if *Reiter* were construed as enabling the ICC to assert the same claims and defenses as a shipper to an undercharge action, it clearly does not give the ICC additional defenses which are not available to shippers.

Accordingly, the ICC's argument that *Reiter v. Cooper* is in conflict with the court of appeals' decision is unfounded. Rather the court of appeals' decision is consistent with and indeed mandated by *Reiter v. Cooper* and *Commercial Metals*.

2. The Ninth Circuit's Decision Is Consistent With *Commercial Metals*

The court of appeals, consistent with *Commercial Metals*, recognized that the ICC has general authority to enforce its credit regulations by seeking an injunction and that the ICC has broad powers to shape remedies for the violation of its rules. Pet. at 31a. Thus, for example, the ICC could prohibit carriers from extending credit when they have previously done so in violation of ICC regulations or it could reject tariff credit provisions which fail to comply with regulations. However, as noted above, both this Court in *Commercial Metals* and the court of appeals in its initial decision, concluded that a violation of the credit regulations does not preclude collection of the filed rate:

> [N]either the statute under which the regulations were promulgated, 49 U.S.C. § 3(2), nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it [the carrier] from collecting the lawful freight charge.

Southern Pacific Transp. Co. v. Commercial Metals, Co., 456 U.S. 344-345.

> The case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed [rate] requirement. Then *Maislin* governs. Regulations, however valid in other contexts, cannot furnish the reasons for letting the carrier abandon the filed rate.

Pet. at 32a.[7]

The ICC's contention that its inability to enjoin the trustee from collecting the filed rate "vitiates" its power to enforce its regulations is a gross exaggeration. As the court of appeals concluded in its opinion on remand, the ICC can invoke all other enforcement mechanisms to enforce its credit regulations.

> The only thing that the ICC cannot do upon a violation of credit regulations is enjoin the carrier from suing the shipper for the filed rate. Since all other enforcement mechanisms remain, the claim that our opinion in Transcon eviscerates the ICC's power to enforce its credit regulations is overblown.

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[7] See also *Consolidated Rail Corp. v. Containair Systems Corp.*, 553 F. Supp. 418, 421 (S.D.N.Y. 1981) holding that credit regulations " . . . implement the Congressional purpose of preventing rate discrimination in the form of differential credit arrangements" and "provide no basis for imposing the extraordinary relief of excusing compliance with applicable tariffs." It is also noteworthy that the credit regulations relied upon by the ICC do not provide an affirmative defense to undercharge claims. See *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. at 345.

Pet. at 7a. Accordingly, notwithstanding the ICC's contention to the contrary, the court of appeals' decision was entirely consistent with *Commercial Metals*.

3. The Ninth Circuit's Decision Upholds The Filed Rate Doctrine and Prevents Discrimination Amongst Shippers

The ICC also argues that its efforts to enjoin the collection of the non-discounted rate would not completely undermine the filed rate doctrine, because the trustee would still be able to collect the discounted rate and interest charges. Pet. at 15-16. The ICC further contends that the non-discounted rate is merely a liquidated damage provision for failure to meet the credit terms and is not the filed rate at all and thus the failure to apply the non-discounted rate will not "interfere" with the filed rate doctrine. Pet. at 16. This characterization makes a mockery of the filed rate doctrine and seeks to circumvent the jurisprudence of this court by denigrating the applicable tariff rate to a mere technical damage provision. Such a position not only ignores the plain language of the tariff in this case, but also threatens the very foundation of the filed rate doctrine.[8]

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[8] Transcon's tariff provided in pertinent part:

1. [D]iscounts *** shall apply when tariff charges are paid within 90 calendar days from date of shipment.
2. * * * This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

As the Court has repeatedly held, the filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act and without it, it would be "monumentally difficult to enforce" the statute's nondiscriminatory and reasonableness requirements. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. at 2769; *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. at 343-344. Here, the ICC is seeking to enjoin the collection of the applicable rate by making a meaningless characterization. The fact is, no matter what the non-discounted tariff rate is called, Transcon's tariff specifically provided that if the shipper did not pay within 90 days of shipment it would be required to pay the non-discounted tariff rate. This was unambiguously set out in Transcon's tariff and was recognized by both the carrier and shippers alike.

Refusing to enforce Transcon's loss of discount provisions – the filed rate – would not only be contrary to the filed rate doctrine, but it would also run afoul of the well-established principle that enforcement of tariff terms is required to prevent discrimination between shippers.

> This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act – to achieve uniformity in freight transportation charges, and thereby to eliminate . . . discrimination and favoritism . . . .

Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. at 344. See also, *Maislin*, 110 S. Ct. at 2766. Here, if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when

the freight charges were paid. Shippers who paid in more than 90 days would, in effect, be given preferential treatment by being granted the same terms as shippers who paid in less than 90 days. This is exactly what the Transcon tariff and the ICC's credit regulations were intended to prevent. Indeed the ICC's regulations pertaining to loss of discount provisions specifically provide that:

> Tariff rules published pursuant to paragraphs (a), (c) and (j) of this section shall not result in unreasonable discrimination among shippers.

49 C.F.R. § 1320.2(h). See also, *Consolidated Rail Corp. v. Containair Systems Corp.*, 553 F. Supp. at 420 ("By enforcing tariffs with unwavering diligence, the courts have assured that rate discrimination cannot be conducted in subtle forms."); 49 U.S.C. § 10741(b) ("A common carrier . . . may not subject a person . . . to unreasonable discrimination"). Notwithstanding this clear statutory pronouncement, the ICC now chooses to ignore the discriminatory consequences of its arguments and thereby unduly prefer late-paying shippers.

Perhaps to justify the discriminatory consequences of its position, the ICC has attempted to paint the trustee and its collection agents as the "villain" and the shippers as "unsuspecting" victims. The reality of this case is far different as the court of appeals recognized:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors.

Pet. at 33a-34a. These shippers intentionally and willfully declined to pay discounted freight charges within the published 90-day period. They took undue and improper advantage of Transcon's extension of credit. As a result, Transcon's cash flow was severely jeopardized and it was forced into bankruptcy. Numerous people lost their jobs and are owed substantial sums of money. As a matter of law and as a matter of equity, these shippers ought not be relieved of their obligation to pay the non-discounted rates published in Transcon's tariffs which are applicable to shippers who fail to pay freight charges in the time allotted.

CONCLUSION

For the foregoing reasons a writ of certiorari should be denied.

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